Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	WC Docket No. 02-112

COMMENTS OF BELLSOUTH CORPORATION

BELLSOUTH CORPORTION

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BellSouth Corporation, on behalf of its itself and its wholly-owned subsidiaries (collectively "BellSouth"), hereby submits these comments on the *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.[1] BellSouth urges the Commission to allow the structural separation and other Section 272 requirements to sunset three years after a Bell Operating Company ("BOC") receives authority to provide in-region, interLATA telecommunications services as prescribed by the Communications Act of 1934, as amended ("Act"). Extending the sunset or adopting a new or modified set of safeguards would advance no legitimate interest, would impose unnecessary and burdensome costs on BOCs, and would deprive consumers of innovative service offerings.

I. INTRODUCTION AND SUMMARY

On May 24, 2002, the Commission released an *NPRM* seeking comment on whether, and, if so, under what conditions, the Commission should extend the structural and nondiscrimination safeguards set forth in Section 272 of the Act. Section 272 requires BOCs to provide in-region,

[1] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 01-112, *Notice of Proposed Rulemaking*, FCC 02-148 (rel. May 24, 2002) ("*NPRM*").

interLATA telecommunications services through a separate affiliate, subject to certain nondiscrimination safeguards.[2] Section 272(f)(1) also provides for the elimination of the separate affiliate requirement and accompanying safeguards three years after a BOC receives authority to provide in-region, interLATA telecommunications services pursuant to Section 271. Specifically, Section 272(f)(1) states that the provisions of the section (with the exception of subsection (e)) "shall cease to apply with respect to . . . the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d) . . ., unless the Commission extends such 3-year period by rule or order."[3]

The Commission asks "how it should evaluate whether the[ ] requirements of section 272 – specifically, the separate affiliate requirement, the nondiscrimination safeguards, and the biennial audit – should sunset after three years or, alternatively, be extended."[4] The Commission

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[2] Section 272 and the Commission's implementing rules impose certain structural and transactional requirements on BOCs and their Section 272 affiliates. Specifically, the statute and Commission rules require the Section 272 affiliate to operate independently; maintain separate books and accounts; have separate officers, directors, and employees; obtain credit in a manner that would not permit a creditor to have recourse to the assets of the BOC; and conduct all transactions on an arm's length basis with any such transactions reduced to writing. 47 U.S.C. § 272(b); 47 C.F.R. § 53.203. Section 272(c) imposes nondiscrimination safeguards that require a BOC to provide to or procure from unaffiliated entities the same goods, services, facilities, and information that it provides to or procures from its Section 272 affiliate at the same rates, terms, and conditions. Section 272(e) sets forth additional nondiscrimination requirements, including, among other things, the obligation to fulfill requests from unaffiliated entities for telephone exchange service and exchange access within a period no longer than the period in which it provides such services to itself or its affiliate. *See* 47 U.S.C. § 272(e). Section 272(d) requires a BOC to submit to a biennial audit after obtaining Section 271 long distance relief to ensure compliance with Section 272 requirements. 47 U.S.C. § 272(d). Throughout the instant pleading, BellSouth refers to the obligations set forth above collectively as the "separate affiliate requirements."

[3] 47 U.S.C. § 272(f)(1).

[4] *NPRM*, ¶ 10.

further seeks input on whether it should adopt a rule of general applicability or should proceed by examining each state on a case-by-case basis.[5]

As demonstrated more fully herein, there are compelling statutory and policy grounds for allowing all of the relevant separate affiliate requirements to sunset as scheduled. First, the plain language of the Act and its legislative history make clear that there is a presumption that the Section 272 restrictions would sunset three years after a BOC first obtains Section 271 relief. Second, adequate safeguards that are substantially less costly than structural separation continue to exist to protect against any potential competitive harms. Finally, the timely expiration of the Section 272 restrictions will benefit consumers by enhancing the BOCs' ability to compete in the long distance market.

Extending the sunset or adopting a new set of rules or safeguards would severely undermine the carefully crafted framework established by Congress in the Act. First, BOCs were required to open their local markets to competition. Second, having accomplished this task and having obtained authority to provide in-region, interLATA telecommunications services, BOCs were required to provide these services through a separate affiliate for a finite period of time. Finally, after a three-year period, Congress expected the BOCs to be relieved of Section 272's prohibitions in the absence of a compelling need to retain these requirements. In light of the foregoing, BellSouth urges the Commission to allow all of the separate affiliate requirements to sunset as scheduled – three years after a BOC is first authorized to provide in-region, interLATA telecommunications services.

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[5] *NPRM*, ¶ 10.

II. THERE IS A STATUTORY PRESUMPTION THAT THE SECTION 272 SEPARATE AFFILATE REQUIREMENTS WILL SUNSET THREE YEARS AFTER A BOC RECEIVES LONG DISTANCE AUTHORITY.

Section 272 presumes that the separate affiliate requirements will expire three years after a BOC receives authorization to provide in-region, interLATA telecommunications services pursuant to Section 271. This statutory presumption is unambiguous. Congress properly recognized that the structural and non-structural safeguards established in Section 272 could serve the public interest only for a finite period of time. As the Commission points out, "Congress made the judgment that the BOCS should be subject to the structural and nondiscrimination safeguards in section 272 only temporarily after entry into the long distance market."[6] Clearly, sunset is the default.

To support an extension of any type, there must be substantial and specific evidence establishing that, in the absence of the separate affiliate requirements, competition would be adversely affected. This evidentiary burden is extremely difficult to overcome, especially in light of the fact that existing, less burdensome safeguards are more than sufficient to protect against any potential threat to competition. Given the statute's presumption in favor of sunsetting the separate affiliate requirements, the Commission should conclude that an extension is unwarranted.

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[6] *NPRM*, ¶ 8.

A. The Act Requires The Elimination Of The Separate Affiliate Requirements On A BOC-by-BOC Basis, Not A State-by-State Basis.

The Act mandates that the separate affiliate requirements sunset on a BOC-by-BOC basis rather than on a state-by-state basis as proposed by the Commission.[7] According to the Commission, "the sunset dates for each BOC will vary depending upon when each state receives section 271 approval."[8] The Commission further explains that "Verizon's New York section 272 requirements will sunset in December of 2002, and SBC's Texas section 272 requirements will sunset in June 2003, unless the Commission acts to extend them."[9] These statements demonstrate that the Commission interprets the sunset provision of Section 272 as applying on a state-by-state basis. Such an interpretation conflicts with the plain language of the Act. Section 272 does not tie the sunset of the separate affiliate requirements to long distance approval on a per-state basis.

The plain language of Section 272 demonstrates that Congress did not intend the separate affiliate requirements imposed on a particular BOC to sunset on a piecemeal basis. Contrary to the Commission's interpretation, the statute simply is not drafted that narrowly. Section 272(f) provides as follows:

> The provisions of this section (other than subsection (e) of this section) shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company *3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services* under section

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[7] As an example, unless the Commission extends the separate affiliate requirements, BellSouth would be relieved of its Section 272 obligations in May 2005 across its nine-state region because it first obtained Section 271 relief in May 2002.

[8] *NPRM*, ¶ 7.

[9] *NPRM*, ¶ 7.

271(d) of this title, unless the Commission extends such 3-year period by rule or order.[10]

Established rules of statutory construction mandate that the Commission follow the express language of Section 272. The statute does not say that the Section 272 separate affiliate requirements will sunset on a state-by-state basis or that the sunset is limited to the particular state(s) in which a BOC has obtained long distance authority. The Commission, therefore, must modify its interpretation of Section 272 to comport with the Act, which requires the separate affiliate requirements to sunset three years after a BOC receives Section 271 authority in its first state (unless the Commission has a compelling reason to extend). This is the only interpretation permitted by the plain language of the Act.

Even if there were a question regarding the meaning of Section 272, which there is not, the legislative history of Section 272 underscores BellSouth's reading of the statute. Had Congress intended Section 272 to sunset on a state-by-state basis it would have explicitly said so.[11] Congress's intent is clear when one compares the differences among prior bills, the various amendments, and the final bill ultimately adopted by Congress. For example, in the House bill (H.R. 1555), the sunset provision was drafted as follows: "The provisions of this section shall cease to apply *in any local exchange market* 3 years after the date of enactment of this part."[12]

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[10] 47 U.S.C. § 272(f)(1) (emphasis added).

[11] *See, e.g., Brown v. Gardner*, 513 U.S. 115, 115 S. Ct. 552, 556 (1994) (quoting *Russello v. United States*, 464 U.S. 16, 23 ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal marks omitted); *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655, 666 (D.C. Cir. 1994) (*en banc*), *cert. denied,* 514 U.S. 1032, 115 S. Ct. 1392 (1995) ("The fact that Congress omitted equivalent language . . . cannot be deemed unintentional or immaterial.").

[12] H.R. Rep. No. 104-204, at 11 (1995) (47 U.S.C. § 246(k) as introduced in House bill) (emphasis added).

Thus, the House bill, which required the expiration of the separate affiliate requirements three years after the Act was enacted, included the language "in any local exchange market." This language, however, is absent from the Act.

Although the Senate bill did not include a sunset provision, the House amendment to the Senate bill contained the following sunset provision: "The provisions of this section shall cease to apply to any Bell operating company *in any State* 18 months after the date such Bell operating company is authorized pursuant to section 245(c) to provide interLATA telecommunications services *in such State.*"[13] Because these "state" references were omitted from the final bill that ultimately became the Telecommunications Act of 1996, Section 272(f)(1) contains no references to states or local markets. Congress's removal of these terms therefore was purposeful and intentional.

The plain text of the Act controls and the clear omission of language included in prior bills and amendments ("in any local exchange market"; "in any State"; "in such State") is compelling evidence that Congress did not intend the expiration of the separate affiliate requirements to occur on a state-by-state basis. Rather, the plain language of the Act and the legislative history make abundantly clear that the separate affiliate requirements should sunset three years after a BOC receives Section 271 authority to provide in-region, long distance service in its first state.

Further evidence that Congress envisioned a single sunset for a BOC, not multiple expiration dates, can be found in the Conference Report. The Conference Report states that "[t]he three year period commences on the date on which the BOC is authorized to offer

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[13] 141 Cong. Rec. H8445 (Aug. 4, 1995).

interLATA services." The use of the singular term "three year period" is persuasive evidence that Congress intended a single sunset for a BOC. Again, had Congress desired to establish multiple expiration periods for a single BOC, it would have used the plural term, "periods," to describe the sunset process. However, it did not. This is further evidence that Congress expected a BOC to be relieved of the Section 272 obligations after the expiration of a single three-year period, not multiple three-year periods applied on a state-by-state basis.

An analysis of other sections of the Act further supports BellSouth's reading of the statute. The House bill contained a provision comparable to Section 271 of the Act – Section 245(k). Section 245(k) of the House bill stated: "The provisions of this section shall cease to apply *in any local exchange market*, defined by geographic area and class or category of service, that the Commission and the State determines has become subject to full competition."[14] This provision, which did not become part of the Act, contains the language "in any local market."[15] The inclusion of this language in the House bill's version of Section 271 evidences the intent to limit the expiration of the requirements in that provision to the particular market at issue.

Clearly, when Congress desired to place conditions or particular limitations on a sunset, it expressly did so. When it wanted to restrict the sunset of certain provisions to a particular local market or state, it included language to that effect. Section 272(f)(1) contains no such language; therefore, it is clear that Congress intended the separate affiliate requirements to sunset on a BOC-by-BOC basis, not a state-by-state basis. Because the Commission's reading of Section

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[14] H.R. Rep. No. 104-204, at 10 (1995) (House Bill as introduced Section 245(k)) (emphasis added).

[15] As noted above, the separate affiliate provision of the House bill contained the same language – "in any local market." H.R. Rep. No. 104-204, at 11 (1995) (47 U.S.C. § 246(k) as introduced in House bill).

272 cannot be squared with the plain language of the statute or its legislative history, the Commission must modify its prior conclusion and find that Section 272 requires the expiration of the separate affiliate requirements on a BOC-by-BOC basis rather than a state-by-state basis.

III. THE COMMISSION'S FRAMEWORK FOR EVALUATING THE SUNSET MUST COMPLY WITH THE ACT.

In considering whether to sunset the separate affiliate requirements, the Commission is obligated to comply with the letter and intent of the Act. As demonstrated in Section II above, there is a statutory presumption in favor of allowing the separate affiliate requirements to expire after a three-year period. Therefore, the Commission need not embark upon the time-consuming effort of developing new rules or modifying existing safeguards. This approach unnecessarily complicates matters and is not what Congress envisioned. The Commission need only start with the basic premise that, absent compelling circumstances, a BOC should be relieved of its Section 272 obligations three years after receiving authority to provide in-region, interLATA telecommunications services as contemplated by Congress. BellSouth further urges the Commission to: (1) allow all of the relevant structural and nondiscrimination safeguards to sunset rather than creating a new regulatory paradigm or tweaking already existing rules; (2) adopt a rule of general applicability that would apply to all BOCs; and (3) refrain from making the sunset contingent upon the state of local competition.

A. Complete Sunset Of The Section 272 Separate Affiliate Requirements And The Commission's Implementing Rules Is Warranted

The Commission should allow all of the relevant separate affiliate requirements and nondiscrimination safeguards to expire three years after a BOC receives long distance

authority.[16] The various alternatives proposed by the Commission (ranging from adopting less stringent separation requirements to eliminating the structural requirements but retaining the nondiscrimination safeguards) are unwarranted, unnecessary, and inefficient.[17] A complete sunset of the Section 272 restrictions is consistent with the statute, is what Congress contemplated, and will best serve the public interest. The Commission therefore should allow the structural and transactional requirements as well as the nondiscrimination safeguards of Section 272 and its implementing rules to expire in full.[18]

BellSouth also urges the Commission not to postpone the sunset in order to complete the second biennial audit.[19] The statute does not authorize the Commission to extend the separate affiliate requirements simply in order to conduct a second audit. Congress established both the biennial audit requirement and the three-year sunset. Therefore, it was fully cognizant that the separate affiliate requirements would sunset prior to the completion of the second audit. Had Congress intended the second biennial audit to occur, it would have provided for a later sunset date. Again, the plain language of the statute controls. Therefore, if the Commission allows the Section 272 requirements to expire three years after a BOC obtains Section 271 relief – as it should – only one audit for that BOC will have been completed. This outcome is fully consistent with the statute. Extending the separate affiliate requirements for the sole purpose of conducting a second audit is not permissible under the Act.

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[16] The Act does not allow for the sunset of Sections 272(e)(1) and (3). 47 U.S.C. § 272(f)(1).

[17] *See NPRM*, ¶ 17.

[18] *See* 47 U.S.C. § 272 and 47 C.F.R. § 53.203.

[19] *NPRM*, ¶ 19.

Also, BellSouth urges the Commission to partially reconsider its prior determination regarding the application of Sections 272(e)(2) and (e)(4).[20] The Commission previously concluded that "the plain language of the statute compels [it] to conclude that sections 272(e)(2) and 272(e)(4) can be applied to a BOC after sunset only if that BOC retains a separate affiliate."[21] Such an interpretation penalizes a BOC that elects to operate an affiliate for business reasons *after* the Section 272 requirements have sunset. While BellSouth agrees that, if there is no affiliate, Sections 272(e)(2) and 272 (e)(4) cannot apply "because there will be no frame of reference for the BOC's conduct,"[22] it also believes that post-sunset, these statutory provisions do not apply to a BOC that decides to retain a separate affiliate.

There is no statutory basis for the Commission to discriminate against a BOC that makes a business decision to operate an affiliate in the absence of a statutory requirement to do so. As the Commission has repeatedly concluded, the concerns about potential cost misallocation and discrimination are eliminated when an affiliate exists. Therefore, it is nonsensical and discriminatory to impose stricter requirements on a BOC that, for business reasons, elects to operate a separate affiliate after the structural separation requirement has expired than would otherwise apply to other carriers. If the Section 272 requirements have expired, they no longer apply – period. Their expiration is not lifted simply because a BOC elects to provide long distance services through a separate affiliate.

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[20] *NPRM*, ¶ 20.

[21] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905, 22035, ¶ 270 (1997) ("*First Report and Order*").

[22] *First Report and Order*, 11 FCC Rcd at 22035, ¶ 270.

BellSouth further urges the Commission not to adopt rules that would mimic Section 272(e)(3), which requires a BOC to impute to itself an amount for access no less than that charged to interexchange carriers.[23] This provision has been in place without any further Commission rules since the passage of the Act in 1996. There is absolutely no reason to adopt rules now. The statute is clear. Moreover, establishing new requirements would frustrate the underlying premise of the Section 272 sunset provision, which is the elimination – not the addition – of regulation.

Finally, regarding Sections 272(e)(1) and (3), the Commission should not continue the biennial audit for these discrete requirements.[24] The Commission concludes that Sections 272(e)(1)[25] and (e)(3)[26] continue to exist even after the other requirements of Section 272 have expired. Notwithstanding the continuation of these requirements, a full scale audit pursuant to Section 272 is unwarranted. The costs incurred to conduct an audit to ensure compliance with these two discrete requirements would dwarf any possible benefits. Moreover, there are less costly and more efficient methods of ensuring compliance with these two statutory provisions. For example, the complaint process operates as a check to ensure that BOCs are satisfying Section 272(e)(1)'s obligation to fulfill requests from unaffiliated carriers in the same time frame it does for itself or its affiliate. With respect to Section 272(e)(3), that statutory provision

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[23] *See NPRM*, ¶ 25.

[24] *See NPRM*, ¶ 24.

[25] Section 271(e)(1) requires a BOC and its affiliate to fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange and exchange access to itself or its affiliates. 47 C.F.R. § 272(e)(1).

[26] Section 272(e)(3) mandates that a BOC charge the affiliate, or impute to itself, an amount for access to its telephone exchange service and its exchange access that is no less than the amount charged to any unaffiliated interexchange carrier for such service. 47 C.F.R. § 272(e)(3).

establishes a requirement similar to that created in other contexts. For example, the CEI requirements of *Computer III* require BOCs to impute tariff charges for their enhanced service offerings.[27] In addition, BOCs are required to impute access charges for interstate intraLATA toll services.[28] None of these existing requirements necessitate regularly scheduled audits to ensure compliance, and there is no reason to adopt an audit requirement in this instance. The Commission's general oversight powers are more than sufficient. Accordingly, in the event of a sunset, the Commission should not retain the audit requirements for Sections 272(e)(1) and (e)(3).

B. The Commission Should Adopt A Rule Of General Applicability.

BellSouth supports a rule of general applicability for expiration of the separate affiliate requirements.[29] Examining each state on a case-by-case basis or requiring individual rulemakings would be contrary to the Act, onerous, time consuming, and impractical.

First, as BellSouth demonstrated above, Section 272(f)(1) requires the expiration of the separate affiliate requirements three years after a BOC first receives long distance authority (in the absence of an extension by the Commission). Requiring a BOC to undergo multiple sunset periods on a state-by-state basis is inconsistent with the plain language of the Act and its legislative history. Three years after a BOC receives permission to provide in-region,

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[27] *Computer IIII Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20 and 98-10, *Report and Order,* 14 FCC Rcd 4289, 4297-99, ¶ 13 (1999).

[28] *Application of Access Charges to the Origination and Termination of Interstate, IntraLATA Services and Corridor Services*, 57 Rad. Reg. 2d (P&F) 1558, ¶ 9, n.22 (1985).

[29] *See NPRM*, ¶ 10.

interLATA telecommunications services, the separate affiliate requirements should no longer apply.

Moreover, from an administrative perspective, reviews on a state-by-state basis are wholly impractical. As the Commission is well aware, the trend has been for BOCs to submit consolidated Section 271 applications for multiple states. In fact, in May 2002, the Commission approved BellSouth's two-state application for Georgia and Louisiana. In June of 2002, both BellSouth and Qwest submitted five-state consolidated applications. The rationale behind these multi-state applications is that much of the information provided regarding compliance with the competitive checklist is not state-specific, but rather regional. Therefore, it is more efficient for the Commission to evaluate such information once rather than engaging in redundant reviews of the same information.

This efficiency argument applies equally to considering the sunset on a state-by-state basis. Besides being inconsistent with the Act as BellSouth demonstrated in Section II, such an approach would unnecessarily strain the already scarce resources of the Commission and impose additional burdens on the BOCs. To avoid an administrative nightmare, the Commission should not require BOCs to petition for sunset relief or establish individual rulemakings.

C. Section 272 Does Not Require the Commission To Evaluate The State Of Competition Prior To Allowing The Separate Affiliate Requirements To Sunset.

The Commission seeks comment on what information or factors it should consider in evaluating whether the statutory requirements should sunset after three years. Specifically, the

Commission asks for input on the nature of the marketplace today nearly three years after Verizon and SBC were granted in-region long distance authority.[30]

BellSouth urges the Commission not to turn this proceeding into a market share measuring exercise. Congress never intended Section 272 to serve as a market review statute. The relevant criteria for BOC interLATA relief is the opening of the local exchange market to competition. Section 271 with its 14-point checklist is the relevant provision for that analysis, not Section 272.

The Commission has already exercised its authority pursuant to Section 271. The Commission has reviewed massive records for 12 Section 271 applications and concluded that several BOCs have satisfied their statutory obligations to open up their local markets. Although the Act's goal is to advance competition in the telecommunications marketplace, the statute does not require competition to continue to grow or reach a certain level[31] before the separate affiliate requirements sunset. Any attempt to establish such an obligation would be inconsistent with the plain language of the Act.

Moreover, because there are a number of factors beyond a BOC's control that can influence the state of competition, it would be inappropriate to condition the sunset on a static snapshot of the marketplace. The telecommunications landscape has changed from year to year

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[30] *NPRM*, ¶¶ 10, 11.

[31] Even with respect to Section 271, there is no statutory requirement that competitors capture a certain market share or that competition occur at a certain rate before a BOC is authorized to provide long distance service. As the Commission has appropriately recognized, "Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance." *See Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, *Memorandum Opinion and Order*, FCC 02-147, ¶ 14 (rel. May 15, 2002) (citing *Sprint v. FCC*, 274 F.3d at 553-54 (stating that "the statute imposes no volume requirements for satisfaction of Track A.").

and will continue to change. However, these changes do not negate the fact that several BOCs have done what the Act required – they have fulfilled the market-opening obligations of the Act and provided long distance services through a separate affiliate. Having satisfied these statutory requirements, Section 272 presumes that the structural and nonstructural safeguards will expire after a three-year period.

Given that there is no statutory basis for converting Section 272 into a market analysis statute, the Commission should not – and, in fact, cannot – link the sunset of the Section 272 separate affiliate requirements to the state of local competition in particular markets. That analysis would have already occurred when the Commission granted a BOC authority to offer in-region, interLATA telecommunications services.

In addition, it is important to note that the Commission has assumed an active role in monitoring BOC compliance with the Act's market-opening mandates after receipt of authority to provide in-region interLATA services. The recently established Section 271 Compliance Review team was created to "monitor on a more structured and systematic basis the companies' compliance with the market opening conditions of section 271 of the Telecommunications Act of 1996." This new Section 271 compliance program "will augment the Enforcement Bureau's existing section 271 oversight and will enhance the Bureau's ability to identify and act upon non-compliant conduct in a timely and appropriate manner."[32] Section 271 is the appropriate venue for considering these competitive issues, not Section 272.

Clearly, there is neither a statutory basis nor a need for the Commission to examine the competitive landscape under Section 272. Section 272 allows the separate affiliate requirements

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[32] *FCC's Enforcement Bureau Establishes Section 271 Compliance Review Program*, DA 02-1322, *Public Notice* (June 6, 2002).

and related safeguards to sunset three years after a BOC receives Section 271 relief. Nowhere in Section 272 is there a requirement that the BOC prove that competition is continuing to grow or has reached a certain level before it can be relieved of the separate affiliate requirements. Accordingly, the Commission may not condition the expiration of the Section 272 requirements on the state of the marketplace.

D. The Commission Should Not Base Its Decision To Sunset The Separate Affiliate Requirements On The Number Of Complaints Filed Against A BOC.

BellSouth objects to a framework in which the Commission bases the sunset on the number of complaints filed against a BOC. Use of this factor as a measuring stick to determine whether to sunset the separate affiliate requirements is not authorized by the Act and would severely undermine the purpose behind the sunset provision. Again, the statutory presumption supports allowing the Section 272 requirements to expire. Relying on the number of complaints as the basis for sunset is fraught with deficiencies – the biggest being the possible filing of frivolous complaints. The number of complaints is not – and never has been – dispositive of a BOC's compliance with the Act or the Commission's rules. If the Commission were to rely on the number of complaints as a tool to evaluate whether to sunset the Section 272 requirements, BOCs could be susceptible to a flood of meritless complaints. The stakes for BOCs and the public are simply too high to base the sunset on such an unreliable factor.

IV. PUBLIC POLICY DICTATES THAT THE COMMISSION ALLOW THE SEPARATE AFFILATE REQUIREMENTS TO EXPIRE AFTER A THREE-YEAR PERIOD.

Extending the separate affiliate requirements would not only undermine the statutory presumption in favor of sunsetting the Section 272 restrictions but also conflict with Congress's

clear directive for deregulation. Congress's preference for competition over regulation is unambiguous and is woven throughout the Act.[33] Allowing the separate affiliate requirements to sunset in a timely manner would promote this policy. In addition, as discussed more fully below, less costly safeguards exist today that are more than sufficient to protect against any alleged harms to competition.

A. Adequate Safeguards Will Continue To Exist After The Separate Affiliate Requirements Sunset.

The Commission asks whether it has sufficient tools under its pre-existing rules to address any residual concerns about cost misallocation and discrimination by the BOCs.[34] The answer is yes. As the Commission itself has recognized,

> A number of safeguards will be available to prevent discriminatory behavior by BOCs after the separate affiliate requirements of section 272 cease to apply. . . . [S]ection 251(c)(5), section 251(g), and the Commission's rules imposing network disclosure and equal access requirements oblige BOCs to provide exchange access on a nondiscriminatory basis. In addition, intraLATA services and facilities must be provided on a nondiscriminatory basis under section 251(c)(3), and the provision of interLATA services and facilities will continue to be governed by the nondiscrimination provisions of sections 201and 202 of the Act. In addition, once local competition develops, it will provide a check on the BOCs' discriminatory behavior because competitors of the BOC affiliates will be able to turn to other carriers for local exchange service and exchange access.[35]

The statutory and regulatory requirements listed above will not go away after the separate affiliate requirements expire. They will continue to exist and will protect competition more efficiently and at a significantly lesser expense than retaining the Section 272 restrictions.

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[33] H.R. Conf. Rep. No. 104-458, at 1 (1996) (the purpose of the Act was to establish "a pro-competitive, de-regulatory national policy framework.").

[34] *NPRM*, ¶ 18.

[35] *First Report and Order*, 11 FCC Rcd at 22036, ¶ 271.

Beginning with its 1986 *Computer III Order*, the Commission has been moving away from reliance on structural separation requirements as a means of addressing alleged competitive threats. In the Commission's own words, it has acknowledged that "structural separation imposes direct costs on the BOCs from duplication of facilities and personnel, the limitations on joint marketing, and the inability to take advantage of scope economies," with the end result being that "the BOCs are unable to organize their operations in the manner best suited to the markets and customers they serve."[36]

The Commission has repeatedly reaffirmed its position that nonstructural safeguards adequately protect competition in a variety of markets. For example, in 1993, the Commission concluded that the public interest would not be served by a structural separation requirement for PCS operations of LECs.[37] The Commission said, "by seriously limiting the ability of LECs to take advantage of their potential economies of scope, such requirements would jeopardize, if not eliminate, the public interest benefits we seek through LEC participation in PCS."[38]

Structural separation carries with it obvious inefficiencies, restrictions, and costs that adversely affect a BOC's ability and incentive to develop innovative offerings. Recognizing these disadvantages, Congress imposed the separate affiliate requirements for a finite period of time. There is no reason to extend the Section 272 restrictions after the three-year period,

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[36] *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), et al.,* CC Docket No. 85-229, *Report and Order*, 104 FCC 2d 958, 1008, ¶ 91 (1986) ("*Computer III*").

[37] *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *et al.*, *Second Report and Order*, 8 FCC Rcd 7700, 7751, ¶ 126 (1993).

[38] *Id.* at 7752, ¶ 126.

especially in light of the fact that a number of less costly statutory and regulatory safeguards will continue to exist.

In addition to the various safeguards described above, it is important to remember that the Commission's enforcement authority remains intact. Whether or not the Commission allows the expiration of the separate affiliate requirements, it retains the ability to enforce the relevant provisions of the Act and the Commission's rules. This authority is in no way diminished by allowing the separate affiliate requirements to expire.

V. CONCLUSION

For all the foregoing reasons, BellSouth respectfully urges the Commission to allow all of the relevant structural separation and other Section 272 requirements to sunset three years after a BOC obtains authority to provide in-region, interLATA telecommunications services. Further, the plain language of the Act and its legislative history compel the Commission to allow these requirements to expire on a BOC-by-BOC basis rather than a state-by-state basis. Extending the sunset or adopting a new or modified set of safeguards would advance no legitimate interest, would impose unnecessary and burdensome costs on BOCs, and would deprive consumers of innovative service offerings.

Respectfully submitted,

BELLSOUTH CORPORATION

Its Attorney

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Date: August 5, 2002

CERTIFICATE OF SERVICE

I do hereby that I have this 5th day of August 2002 served the following parties to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH CORPORATION** by electronic filing addressed to the parties listed below.

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